MALAYSIAN REPORTS

Yap Sing Hock Holdings Bhd & Ors v Chuah Teong Hooi & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-62 OF 1989
ABDUL HAMID OMAR LP, HARUN HASHIM AND MOHAMED YUSOFF SCJJ
11 JULY 1990

Companies and Corporations — Debenture — Whether execution of debenture was a dealing by the company of its own shares — Debenture creating floating charge — Companies Act 1965, s 67(1)

In this case the first appellant had executed a debenture as one of the securities provided by it to secure two letters of guarantee from the third respondent to finance the purchase by the first appellant of the entire share capital of three private companies for a consideration of $46m. To finance the purchase, the third respondent arranged loans from a consortium of financial institutions ('the lenders') backed by its own guarantee. The first appellant provided the following securities: (1) a pledge of all its shares; (2) a debenture creating a specific and floating charge of all its assets both present and future; and (3) the personal guarantees of its directors, the second to fourth appellants. Under the debenture the loans had to be repaid by 29 April 1986 failing which the lenders would turn to the third respondent for payment under the two letters of guarantee. The purchase price was duly settled by the first appellant from the loans extended by the lenders but at the date of repayment the first appellant defaulted and the third respondent was called upon to pay under the two letters of guarantee. It did so and in order to recoup its losses it demanded immediate repayment from the first appellant and following the latter's failure to comply with such demand, the third respondent exercised its rights under the debenture by appointing managers and receivers, the first and second respondents to take possession of all the charged assets of the appellants. Two years and four months later, the appellants applied for a declaration that the debenture executed by the first appellant with the third respondent and the subsequent appointment of the managers and receivers under the debenture are null and void as contravening s 67(1) of the Companies Act 1965. The application was dismissed in the High Court [see [1989] 2 MLJ 503] and the appellants appealed.

Held, dismissing the appeal:

(1) The entire exercise as contemplated by the two loan agreements, the guarantees, the proposals as put forward to the Foreign Investments Committee and Bank Negara did not in any way involve the assets of the three companies to finance the purchase of their shares directly or indirectly.

(2) The commercial reality of the transaction in the peculiar circumstances of this case is that the loans were secured on the existing assets of the first appellant. The floating charge in respect of future assets was additional security to ensure due compliance of the loans and guarantee agreements. This is normal banking practice. In any event, the debenture provides for additional security to be furnished when called upon by the third respondent. This clause enables the third respondent to have access to the assets of the first appellant whenever acquired without resorting to the clauses in the debenture.

(3) Although the prohibition against the giving of any financial assistance either directly or indirectly by a company in dealing with its own shares is wide, it does not prohibit a debenture creating a floating charge as in this case.

[Di dalam kes ini, perayu pertama telah memberi debentur sebagai salah satu sekuriti yang diberi olehnya untuk menjamin dua surat jaminan dari responden ketiga untuk membiayai pembelian oleh perayu pertama semua modal saham tiga buah syarikat persendirian dengan jumlah wang $46 juta. Untuk membiayai pembelian itu, responden ketiga telah menyusunkan pinjaman dari konsortium institusi-institusi kewangan ('peminjam-peminjam') disandarkan dengan guarantinya sendiri. Perayu pertama telah memberi sekuriti berikut: (1) cagaran semua sahamnya; (2) debentur yang mengwujudkan caj tetap dan terapung ke atas semua asetnya samada kini atau akan datang; dan (3) guaranti peribadi pengarah-pengarahnya iaitu responden yang kedua, ketiga dan keempat. Di bawah debentur itu, hutang itu hendaklah dibayar balik pada atau sebelum 29 April 1986, jika tidak peminjam-peminjam boleh meminta penjelasannya dari responden ketiga di bawah dua surat jaminan itu. Harga pembelian telah dijelaskan oleh perayu pertama dari pinjaman yang diberi oleh peminjam-peminjam akan tetapi pada tarikh hutang itu dikehendaki dibayar balik perayu pertama telah ingkar membuat demikian dan responden ketiga telah diminta menjelaskan hutang itu di bawah dua surat jaminan itu.

Responden ketiga telah membuat demikian dan untuk meraih balik kerugiannya ia telah meminta bayaran serta-merta dari perayu pertama dan apabila perayu pertama gagal membuat demikian, responden ketiga telah menggunakan kuasanya di bawah debentur dengan melantik pengurus dan pentadbir, iaitu responden pertama dan kedua, untuk mengambil alih semua aset perayu-perayu yang dicagar. Dua tahun dan empat bulan kemudian, perayu-perayu telah memohon deklarasi bahawa debentur yang diberi oleh perayu pertama kepada responden ketiga dan kemudiannya perlantikan pengurus dan pentadbir di bawah debentur itu adalah batal dan tidaksah oleh kerana melanggar s 67(1) Akta Syarikat 1965. Permohonan itu telah ditolak oleh Mahkamah Tinggi [sila lihat [1989] 2 MLJ 503] dan perayu-perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Rancangan keseluruhannya seperti yang dimaksudkan oleh dua perjanjian pinjaman, jaminan-jaminan, cadangan yang dikemukakan kepada Jawatankuasa Pelaburan Asing dan Bank Negara tidak sama sekali melibatkan aset-aset tiga syarikat itu untuk membeli saham-saham syarikat-syarikat itu samada langsung atau tak langsung.

(2) Keadaan sebetulnya dari segi perniagaan di dalam keadaan-keadaan khas kes ini ialah pinjaman-pinjaman itu telah dijamin dari aset perayu pertama yang ada. Caj terapung mengenai aset masa depan adalah sekuriti tambahan untuk menjamin kepatuhan sepatutnya kepada perjanjian-perjanjian pinjaman dan jaminan itu. Ini adalah mengikut amalan bank yang biasa. Walau bagaimanapun debentur itu memperuntukkan sekuriti tambahan yang akan diberi jika diminta oleh responden ketiga. Peruntukan ini membolehkan responden ketiga mendapat aset-aset perayu pertama tidak kira bila ia diperolehi tanpa menggunakan klausa yang berkenaan di dalam debentur itu.

(3) Sungguhpun larangan memberi apa-apa bantuan kewangan samada langsung atau tidak langsung oleh sebuah syarikat bagi mengurus sahamnya sendiri adalah luas, ia tidak melarang debentur yang membangkitkan caj terapung seperti di dalam kes ini.]

Cases referred to
1 *Wallersteiner* v *Moir* [1974] WLR 991 (refd)
2 *Heald* v *O'Connor* [1972] 2 All ER 1105 (refd)

Legislation referred to
Companies Act 1965 s 67(1)

Appeal from: Originating Motion No D2-32-36 of 1988 (High Court, Kuala Lumpur)

KS Narayanan for the appellants.
DP Naban for the respondents.

Cur Adv Vult

Mohamed Yusoff SCJ (delivering the judgment of the court): This is an appeal against the decision of Siti Norma Yaakob J [see [1989] 2 MLJ 503] dismissing the appellants' originating motion seeking to declare the debenture executed by the first appellant and the appointment of the first and second respondents as receivers and managers thereunder are null and void by reason of illegality.

Mr Narayanan, counsel for the appellants, informed the court at the outset that for the purpose of this appeal, the appellants would rely on facts as found by the learned judge and the documents produced before the court.

For convenience, the facts as found by the learned judge are reproduced hereunder:

> The only issue raised in this originating motion is whether a debenture executed by the first applicant with the third respondent on 29 April 1985 is caught by s 67(1) of the Companies Act 1965 ('the Act'). The debenture in question is one of the securities provided by the first applicant to secure two letters of guarantee from the third respondent to finance the purchase by the first applicant of the entire share capital of three private companies, namely, Lien Hoe Sawmill Co Sdn Bhd, Tee Bros Enterprises Sdn Bhd and Seng Aik Co Sdn Bhd ('the three companies') for a consideration of $46m.
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> To finance the purchase, the third respondent arranged syndicated loans from a consortium of financial institutions ('the lenders') backed by its own guarantees. Initially, the third respondent required the first applicant to provide the following securities to secure the bank guarantees it was prepared to provide:
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> (1) A pledge of all the shares of the first applicant to the third respondent.
> (2) A deposit of title deeds of certain pieces of land belonging to the three companies together with charge-in-escrow over them in favour of the third respondent.
> (3) An assignment of all the proceeds of sale of the assets of the three companies to the third respondent.
> (4) Personal guarantees of the directors of the first applicant.
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> As regards repayment, the third respondent had also requested that the sources for repayment should come from the cash fixed deposits and the proceeds of sale of the shares of the three companies.
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> However, acting on the legal advice that the securities asked for, particularly those to be provided by the three companies, are illegal transactions as contravening s 67(1) of the Act, the securities that were finally given by the first applicant were: (1) a pledge of all its shares; (2) a debenture, creating a specific and floating charge of all its assets, both present and future; and (3) the personal guarantees of its directors, the second to fourth applicants.
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> Under the debenture, the loans had to be repaid by the first applicant by 29 April 1986, failing which, the lenders would turn to the third respondent for payment under the two bank guarantees.
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> The purchase price was duly settled by the first applicant on 29 April 1985 from loans extended by the lenders pursuant to two loan agreements executed by the first applicant with the lenders but on the date of repayment, the applicant defaulted and the third respondent was called upon to pay under the two letters of guarantee. It did so and in order to recoup its losses, it demanded immediate repayment from the first applicant and following the latter's failure to comply with such demand, the third respondent exercised its rights under the debenture by appointing managers and receivers, the first and second respondents, on 9 May 1986 to take possession of all the charged assets of the first applicant and generally to do all at which the first applicant may have done in the ordinary conduct of its business.
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> Two years and four months after such appointment, the first applicant together with its directors and shareholders, the second to fourth applicants have, through this originating motion, asked for a declaration, inter alia, that the debenture executed by the first applicant with the third respondent and the subsequent appointment of the first and second respondents as managers and receivers under the debenture, are null and void as contravening s 67(1) of the Act. Section 67(1) states as follows:
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> > 'Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.'
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> Under sub-s (3), if there is any contravention of sub-s (1), only the officer who is in default shall be guilty of an offence, the penalty for which is imprisonment for two years or a fine of $10,000 or both.

After examining the facts of the case the learned judge came to the following finding:

> It is my considered opinion that the only company that can be held responsible for contravening the statutory provision can only be the three companies and not the first applicant and to bring the three companies within the ambit of s 67(1), the applicants must show that the three companies provided financial assistance in the purchase of their own shares by the first applicant. On the facts of the case before me, that financial assistance can only take the form of the three companies creating a debenture over their own assets in favour of the third respondent.

We agree with the learned judge's finding of fact that the third respondent originally intended to include the assets of the three companies as security for the guarantee but

acting on solicitor's advice it did not pursue with the negotiation as it contravened s 67 of the Act.

There were several grounds advanced by the appellants in their memorandum of appeal but Mr Narayanan wished to confine his argument to only one issue governing this appeal and that is:

> 3 The learned judge after having sought to examine the 'commercial realities of the transactions' failed to conclude that on the facts of the case the granting of the said debenture by the first appellant is in contravention of the prohibitory provisions of s 67(1) of the Companies Act.

In his submission, Mr Narayanan contended that the debenture executed by the first appellant with the third respondent was in contravention of s 67 of the Act by reason that, indirectly, the assets of the three companies were intended to be securities for the guarantees granted by the third respondent. He submitted that the court ought to examine the entire transaction in order to decide the question of commercial realities. He also referred to *Wallersteiner* v *Moir*[1] and quoted Lord Denning MR on the historical aspect of s 54 of the equivalent English Act and how the commercial realities were examined there, in these words:

> That section was first introduced in the Act of 1929. It was enacted so as to deal with a mischief which was described by Lord Greene MR, in *In re VGM Holdings Ltd* [1942] Ch 235, 239:
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> 'Those whose memories enable them to recall what had been happening after the last war for several years will remember that a very common form of transaction in connection with companies was one by which persons — call them financiers, speculators, or what you will — finding a company with a substantial cash balance or easily realizable assets such as war loan, bought up the whole or the greater part of the shares of the company for cash and so arranged matters that the purchase money which they then became bound to provide was advanced to them by the company whose shares they were acquiring, either out of its cash balance or by realization of its liquid investments. That type of transaction was a common one, and it gave rise to great dissatisfaction and, in some cases, great scandals.'
>
> Lord Greene MR spoke those words in the year 1942. Since that time financiers have used more sophisticated methods. You have only to look at such cases as *Steen* v *Law* [1964] AC 287 and *Selangor United Rubber Estates* v *Cradock (No 3)* [1968] 1 WLR 1555 to see the devices which they use. Circular cheques come in very handy. So do puppet companies. The transactions are extremely complicated, but the end result is clear. You look to the company's money and see what has become of it. You look to the company's shares and see into whose hands they have got. You will then soon see if the company's money has been used to finance the purchase.

On the other hand, Mr Naban, counsel for the respondents, argued that the debenture was not given by the three companies directly or indirectly. Instead it was given by the first appellant. It is his contention that 'company' referred to in s 67(1) of the Act must mean the three companies and not the first appellant. Accordingly, it is for the appellants to show that the debenture was created by the three companies for s 67(1) to apply. He cited *Heald* v *O'Connor*[2] to show that in that case the debenture was created by the company in which shares were bought. He argued that in this case it has nothing to do with the companies in which shares are bought. He also argued that the debenture in this case deals with the assets of the first appellant. He further argued that the basis of the application, namely, that the debenture is bad as it provides financial assistance by the three companies is without foundation.

What were in fact the commercial realities of this transaction? We perceived from the facts and the documents produced that in the course of arranging for the financing of the acquisition of the three companies, the first appellant first obtained the approval of the Foreign Investments Committee on 18 December 1984. It also sought Bank Negara's approval to borrow from off-shore banks a sum not exceeding $20m. In response to a query from Bank Negara, Asia International Merchant Bankers Bhd, on behalf of the first appellant, replied that repayment sources for the loan would be through inter-company borrowings from the Hong Huat Group of companies which is also controlled by Dato Yap Sing Hock himself, the alter ego of the first appellant. On that basis, Bank Negara gave its approval on 24 April 1985.

Two consortiums of banks actually furnished the funds for the loan amounting to US$8m and M$20m. The two loan agreements were executed between the consortiums and the first appellant with the third respondent as guarantor. On the very day the guarantees were issued on 29 April 1985, the first appellant drew-down the whole of the loan sum from the two consortiums of banks. The funds were remitted by the banks direct to the first appellant and not through the third respondent. In our view, the entire exercise as contemplated in the two loan agreements, the guarantees, the proposals as put forward to the Foreign Investments Committee and Bank Negara did not in any way involve the assets of the three companies to finance the purchase of their shares either directly or indirectly.

In the present case, on those facts, it is our considered judgment that commercial reality of the transaction in the particular circumstances of this case is that the loans were secured on the existing assets of the first appellant. The floating charge in respect of future assets was additional security to ensure due compliance of the loans and guarantee agreements. This is a normal banking practice. In any event, the debenture provides for additional security to be furnished when called upon by the third respondent (see s 3.04 of the guarantee agreement) This clause enabled the third respondent to have access to the assets of the first appellant, whenever acquired without resorting to floating charge clauses in the debenture. In our view, although the prohibition against the giving of any finan-

cial assistance either directly or indirectly by a company in dealing with its own shares is wide, it does not prohibit a debenture creating a floating charge as in the present case. For these reasons we would dismiss the appeal with costs. Deposit to respondents to account for taxed costs.

Appeal dismissed.

Solicitors: *KS Narayanan Associates; Skrine & Co.*

Reported by *Prof Ahmad Ibrahim*

Public Bank Bhd v Pengarah Tanah dan Galian, Johore Bahru & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-35 OF 1989
HASHIM YEOP A SANI CJ (MALAYA), GUNN CHIT TUAN AND JEMURI SERJAN SCJJ
29 JUNE 1990

Land Law — Registrar's caveat — Land charged to bank — Order for sale of land obtained — Registrar's caveat entered on ground that registered owner owed income tax — Application to registrar to remove caveat refused — Appeal — Time for appeal — National Land Code 1965, ss 321 & 418

The registered owners of a piece of land at Kota Tinggi, Johore, had charged it to the appellant bank. Owing to default by the registered owners, the appellant obtained an order of the sale of the said land toward satisfaction of the amount outstanding on the loan. Before the auction sale could be held, the appellant received a notification on 20 October 1988 from the first respondent that he had entered a registrar's caveat upon the register document of title to the said land on the ground that the registered owners owed income tax to the Inland Revenue Department. After the first respondent had refused to cancel the registrar's caveat, the appellant on 29 January 1989 appealed to the High Court against the refusal. The learned Judicial Commissioner dismissed the application. [See [1990] 2 MLJ 510.] He held that s 321(3) of the National Land Code 1965 did not apply in this case as the registrar had not cancelled the caveat of his own motion nor was there any application by the registered proprietors of the land. He also held that the appeal was filed out of time as it was filed more than three months after the date of the communication of the registrar to enter the caveat.

Held, dismissing the appeal:

(1) The learned Judicial Commissioner was correct in holding that s 321(3)(a) of the National Land Code 1965 did not apply in this case as the registrar had not cancelled the registrar's caveat of his own motion.

(2) The learned Judicial Commissioner was also correct in law when he held that for the purpose of computation of time under s 418 of the National Land Code 1965, time runs from the communication of the decision of the registrar to enter a caveat because in the circumstances of this case, a decision under s 418 of the Act can only include any refusal of an application for the cancellation of the registrar's caveat under para (b) of s 321(3) of the Act by the proprietor of the land affected. The decision in this case which could be appealed against by the appellant, who is not the proprietor of the land, under s 418 of the Act was the act of the Registrar in entering the registrar's caveat. The appeal was therefore correctly held to be out of time.

[Pemilik-pemilik didaftar sekeping tanah di Kota Tinggi, Johore, telah mencagarkan tanah itu kepada bank perayu. Oleh kerana pemilik-pemilik itu telah ingkar, perayu telah mendapat perintah penjualan tanah itu untuk pembayaran jumlah wang yang terhutang. Sebelum penjualan lelong dapat diadakan, pada 20 Oktober 1988 perayu telah mendapat pemberitahuan dari responden pertama bahawa ia telah memasukkan kaveat pendaftar ke atas tanah itu oleh kerana pemilik-pemilik didaftar tanah itu telah berhutang cukai pendapatan kepada Pejabat Hasil Dalam Negeri. Selepas responden pertama telah enggan membatalkan kaveat pendaftar itu, perayu pada 29 Januari 1989 telah merayu ke Mahkamah Tinggi terhadap keengganan itu. Yang arif Pesuruhjaya Kehakiman [sila lihat [1990] 2 MLJ 510] telah menolak permohonan itu. Beliau berpendapat bahawa s 321(3) Kanun Tanah Negara 1965 tidak terpakai di dalam kes ini oleh kerana pendaftar telah tidak membatalkan kaveat itu atas usulnya sendiri dan tidak terdapat apa-apa permohonan oleh pemilik tanah itu. Beliau juga berpendapat rayuan itu telah dibuat selepas masa yang ditetapkan oleh kerana rayuan itu dibuat lebih dari tiga bulan selepas tarikh pemberitahuan pendaftar memasukkan kaveat itu.

Diputuskan, menolak rayuan itu:

(1) Yang arif Pesuruhjaya Kehakiman betul apabila beliau memutuskan bahawa s 321(3)(a) Kanun Tanah Negara 1965 tidak terpakai di dalam kes ini oleh kerana pendaftar tidak membatalkan kaveat itu atas usulnya sendiri.

(2) Yang arif Pesuruhjaya Kehakiman juga betul dari segi undang-undang apabila beliau memutuskan bahawa untuk maksud pengiraan masa di bawah s 418 Kanun Tanah Negara 1965, masa berjalan dari pemberitahuan keputusan pendaftar memasukkan kaveat oleh kerana di dalam keadaan kes ini sesuatu keputusan di bawah s 418 Kanun itu hanya termasuk penolakan permohonan untuk membatalkan kaveat pendaftar di bawah perenggan (b) s 321(3) Kanun itu oleh pemilik tanah yang terlibat. Keputusan yang mana terhadapnya rayuan boleh dibuat oleh perayu, yang bukan pemilik tanah itu, dibawah s 418 Kanun itu ialah perbuatan pendaftar memasukkan kaveat pendaftar. Keputusan bahawa rayuan itu telah dibuat selepas masa yang ditetapkan adalah betul.]

Cases referred to

1 *Registrar of Titles, Johore* v *Temenggong Securities Ltd* [1976] 2 MLJ 44 (not folld)
2 *Land Executive Committee of Federal Territory* v *Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234 (refd)

Legislation referred to

National Land Code 1965 ss 320, 321, 418

Appeal from: Originating Motion No 25-10 of 1989 (High Court, Johore Bahru)

Tan Kiah Teck for the appellant.
Abdul Rahim Uda (Federal Counsel) for the first respondent.
Mohd Bazain Idris (Senior Federal Counsel) for the second respondent.

Cur Adv Vult